STATE OF MICHIGAN

COURT OF APPEALS

COMTECH INTERNATIONAL DESIGN GROUP, INC.,	UNPUBLISHED May 27, 2003
Plaintiff-Appellee,	
v	No. 245144 Oakland Circuit Court
DEBORAH PRICE and THE BARTECH GROUP,	LC No. 2002-041424-CZ
Defendants-Appellants.	

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's November 8, 2002 order denying defendant The Bartech Group's ("Bartech") motion for summary disposition and continuing a preliminary injunction previously entered in favor of plaintiff.[1] We affirm in part, and reverse in part.

Comtech International Design Group, Inc. ("Comtech"), is a provider of contract engineering and technology staffing solutions with offices in Troy, Michigan and Windsor, Ontario. On May 20, 1998, Comtech hired defendant Deborah Price to work in its Troy office. As a condition of her employment, Price was required to sign an employment agreement. Pursuant to the non-compete clause of this contract, Price agreed that if she left Comtech, she would not, for a period of eighteen months, "engage in competition in a business similar to or be employed by a competitor of [Comtech], within a radius of fifty (50) miles of any office(s) and/or area(s)" to which she was assigned. Price also agreed that she would never use or disclose any confidential information belonging to Comtech. Price served as Comtech's Technical Recruitment/Account Manager throughout the majority of her employment.

Price resigned from her position with Comtech on February 21, 2002. Shortly thereafter, she began working for Bartech in its Troy office. Comtech claimed that Bartech was a direct

[1] We note that although Price is named as a coappellant, the record indicates that Bartech was the only party to file a motion for summary disposition with the trial court. However, the decision of this Court regarding the motion for summary disposition will obviously be dispositive of the issues that pertain to Price.

competitor and filed a complaint against Bartech and Price. In its complaint, Comtech essentially alleged that Price breached her contractual and fiduciary obligations to Comtech. It further asserted that Bartech tortiously interfered with Comtech's contractual and business relationships. Comtech requested a temporary restraining order (TRO) and preliminary injunction against Price and Bartech alleging irreparable damages. The trial court entered a TRO on June 11, 2002, enjoining Price from commencing or continuing employment with Bartech. The TRO also enjoined Bartech from working directly with Price, using Comtech's confidential business information, or interfering with Comtech's prospective client relationships for a period of eighteen months from the date of the order.

At a hearing on June 11, 2002, Bartech offered to transfer Price to its offices in Ohio or Florida. However, Comtech argued that it competed with Bartech in both locations. In a subsequent hearing on June 26, 2002, the trial court continued the TRO in the form of a preliminary injunction. According to the trial court, the term "assigned," as used in the contract, extended the geographical range beyond Price's physical work location. In response, Bartech filed a motion for summary disposition on July 1, 2002, claiming that "the non-compete agreement may not be construed to preclude Price's employment in Ohio and Florida because Comtech does not have a competitive business interest in either of those states." However, the trial court denied Bartech's motion and continued the preliminary injunction. The trial court concluded that the contract prohibited Price's employment with any competitor that had an office within fifty miles of Comtech.

On appeal, defendants assert that the trial court erred in failing to discontinue the preliminary injunction and grant their motion for summary disposition. A trial court's denial of a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Likewise, questions concerning contract interpretation are subject to review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). However, a trial court's decision to grant injunctive relief is reviewed for an abuse of discretion. *Schadewald v Brule*, 225 Mich App 26, 39; 570 NW2d 788 (1997).

A motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).[2] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition under MCR 2.116(C)(10) is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Auto-Owners Ins Co, supra* at 397.

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[2] We note that neither the trial court nor Bartech indicated the section of MCR 2.116 relied upon in the motion for summary disposition. Because the trial court relied on matters outside the pleadings, this issue will be reviewed under MCR 2.116(C)(10). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633, n 4; 601 NW2d 160 (1999).

"The primary goal of contract interpretation is to honor the intent of the parties." *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390 (1999). A contract's language should be afforded its plain and ordinary meaning. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). When the contractual language is clear and unambiguous, its meaning is a question of law for the court to decide. *Conagra, supra* at 132. However, if contract language is unclear or reasonably susceptible to more than one meaning, a question for the finder of fact exists. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998). Ambiguities within a contract are generally construed against the draftor. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563-565; 596 NW2d 915 (1999).

The relevant portions of the employment contract at issue in this case provide as follows:

> 7. **AGREEMENT NOT TO ENGAGE IN COMPETITIVE BUSINESS**
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> EMPLOYEE further agrees that in the event of separation of employment for any reason whatsoever, he/she shall not, for a period of eighteen (18) months from the date of such termination . . . either directly or indirectly, on his/her own account or as an agent, stockholder, employer, employee or otherwise in conjunction with any other person or entity, engage in competition in a business similar to or be employed by a competitor of COMTECH INTERNATIONAL, *within a radius of fifty (50) miles of any office(s) and/or area(s) to which he/she was assigned, and/or managed for COMTECH INTERNATIONAL or its affiliates*; nor will he/she solicit accounts, and personnel he/she was assigned to, managed and/or became aware of, or engage in any other competitive activities *within the above-referenced geographical location(s).* EMPLOYEE further agrees that regardless of geographic location, he/she will not, during said time period, service any customers he/she was assigned to that COMTECH INTERNATIONAL has done any business with during the preceding eighteen (18) months. EMPLOYEE acknowledges that doing so in any manner would interfere with, diminish and otherwise jeopardize and damage the business and goodwill of COMTECH INTERNATIONAL. [Emphasis added.]
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> 8. **AGREEMENT NOT TO COMPETE FOR ACCOUNTS OR PERSONNEL**
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> EMPLOYEE further agrees that within said period of eighteen (18) months, as well as the duration of this Agreement, he/she will not in any way solicit, divert, take away or attempt to solicit, divert or take away any staff, temporary personnel, contract personnel, trade, clients, customers, business, or goodwill from COMTECH INTERNATIONAL or otherwise compete for said accounts or personnel which he/she serviced and/or became known to him/her through his/her employment with COMTECH INTERNATIONAL and agrees not to influence or attempt to influence any of COMTECH INTERNATIONAL's customers or contract and temporary personnel not to do business with COMTECH INTERNATIONAL.

Agreements not to compete are permissible in Michigan if they are reasonable. MCL 445.774a(1); *Thermatool Corp v Borzym*, 227 Mich App 366, 372; 575 NW2d 334 (1998). Pursuant to MCL 445.774a(1):

> An employer may obtain from an employee an agreement or covenant which *protects an employer's reasonable competitive business interests* and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is *reasonable as to its duration, geographical area, and the type of employment or line of business.* To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement in order to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited. [Emphasis added.]

The language of the instant contract unambiguously precludes Price's employment with any competitor within a fifty miles radius of the offices or areas that she was assigned to while working at Comtech. On its face, the noncompete clause appears to be reasonable and valid. Assuming that Bartech is in competition with Comtech, Price clearly violated this agreement by working for Bartech in its Troy office. However, there is nothing in the contract to prohibit Price from being employed by Bartech, or any competitor, beyond the fifty mile radius. Yet, the trial court concluded that Price could not be employed by any competitor that had an office within fifty miles of Bartech's Troy office, regardless of whether Price was physically located in that office. Thus, it appears that the trial court unreasonably expanded the geographical limits set forth in the contract by effectively barring Price from working for Bartech worldwide. See MCL 445.774a(1). Accordingly, we conclude that the trial court abused its discretion in issuing a preliminary injunction completely barring Bartech from hiring Price on the basis that it has an office within fifty miles of Comtech. *Schadewald, supra* at 39.

Comtech nevertheless suggests that Bartech should be precluded from employing Price in its Ohio office because Comtech has Ohio clients. It further notes that Price admitted to placing a Comtech employee in Ohio. However, it is undisputed that Bartech's Ohio office is not within fifty miles of any Comtech office in Ohio. Indeed, Comtech does not have any offices within the state of Ohio. Moreover, Price only admitted to placing one employee outside the state of Michigan or Canada.[3] For these reasons, we remand this case to the trial court to amend the preliminary injunction and limit its applicability to Michigan.

Nevertheless, we find that summary disposition is inappropriate with regard to the remainder of Comtech's claims. After reviewing the record, it is apparent to this Court that there are questions of fact concerning whether Price breached the confidentiality provision contained in her employment contract. Indeed, Comtech presented evidence suggesting that Price unlawfully engaged in competition with Comtech by soliciting customers for Bartech with

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[3] Price claimed that she originally placed this employee with a Farmington Hills, Michigan company and that the employee was then assigned to work in Sydney, Ohio.

Comtech's confidential information.[4] While Price denies having knowledge of any confidential or proprietary information about Comtech, this is an issue for the finder of fact.

Further, questions of fact remain concerning whether Bartech tortiously interfered with Comtech's contractual or business relationships. See *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996); *Wood v Herndon & Herndon Investigations, Inc*, 186 Mich App 495, 499-500; 465 NW2d 5 (1990). There was evidence presented that Bartech continued to employ Price in its Troy office despite knowledge of the noncompete provisions contained in her employment contract with Comtech. Comtech also averred that Bartech specifically employed Price to provide contract engineering and technology solutions, as prohibited in her employee agreement with Comtech. We note that there are several counts in Comtech's complaint that Bartech failed to address in its motion for summary disposition. This Court is not required to address claims raised for the first time on appeal. *Zdrojewski v Murphy*, 254 Mich App 50, 62; 657 NW2d 721 (2002).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ William B. Murphy

[4] For example, Comtech accused Price of using the knowledge she obtained at Comtech in an attempt to attempt steal its business opportunities with Daimler-Chrysler. Specifically, Comtech claimed that after Price resigned, she continued to meet with Flora Robinson. Apparently, Ms. Robinson was a manager at Daimler-Chrysler with whom Price had developed a working relationship while Price was working for Comtech.